

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

NINA ROSSI, DESTIN DEFEO, and MARTIN
HERMAN,

Plaintiffs,

– against –

SCI FUNERAL SERVICES OF NEW YORK,
INC., and ALDERWOODS (NEW YORK), LLC,

Defendants.

ORDER

15-CV-473 (ERK) (VMS)

KORMAN, J.:

I adopt Magistrate Judge Scanlon’s reasoned and thoughtful Report and Recommendation in this case with regard to the issue of who should decide whether the plaintiffs’ claims may proceed on a class basis in arbitration. While this is a very close question with good arguments both ways, I add these brief additional words. The defendants had the complete ability to escape through better drafting the general rule that once a valid arbitration clause exists, its application is for the arbitrator to determine. Indeed, arbitration agreements regularly resolve this issue.

Magistrate Judge Scanlon also recommended that I dismiss this action without prejudice. I decline to adopt this recommendation. A dismissal of the case, where the parties have agreed to refer all claims to arbitration and a stay has been requested, would be inconsistent with the Second Circuit’s holding in *Katz v. Cellco P’ship*, 794 F.3d 341, 347 (2d Cir. 2015). Instead, I order that the case be stayed pending arbitration. Because, with respect to the issue on which I have adopted the recommendation, “there is no controlling Supreme Court or Second Circuit precedent on point and the only available guiding precedent does not cut decisively in either direction,” *In re A2P SMS Antitrust Litig.*, No. 12-CV-2656, 2014 WL 4247744, at *2 (S.D.N.Y. Aug. 27, 2014), and because there is a conflict among the circuits on this issue, *compare Chesapeake Appalachia, LLC*

v. Scout Petroleum, LLC, 809 F.3d 746 (3d Cir. 2016), and *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013) (both holding that the question of the availability of classwide arbitration is a question for the court), with *Robinson v. J&K Admin. Mgmt. Servs., Inc.*, No. 15-10360, 2016 WL 1077102 (5th Cir. Mar. 17, 2016) (holding that the same question is for the arbitrator), I certify this interlocutory order for appeal pursuant to 28 U.S.C. § 1292(b) for the reasons outlined in Judge Nathan's opinion certifying an appeal of the same issue in *In re A2P SMS Antitrust Litig.*, No. 12-CV-2656, 2015 WL 876456 (S.D.N.Y. Mar. 2, 2015). Specifically, as did Judge Nathan, I frame the question at issue in the order as: who decides—the court or the arbitrator—whether an arbitration agreement permits class arbitration? I stay the arbitration pending the decision of the Court of Appeals on the defendants' application to appeal pursuant to 28 U.S.C. § 1292(b). Should the Court of Appeals grant the application, the defendants should seek any further stay from it.

SO ORDERED.

Brooklyn, New York
March 25, 2016

Edward R. Korman
Edward R. Korman
United States District Judge